Supreme Court, U.S.
FILED

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No. 94-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

PATRICIA BIRKBECK, as Personal Representative of the Estate of Alan Birkbeck, Deceased;
J. C. RICHARDSON,

Petitioners,

v.

MARVEL LIGHTING CORPORATION;
BRUCE T. FENNESSEY,

Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

Herbert W. Louthian
P. O. Box 29202
Columbia, SC 29202
(803) 256-4274

Ray P. McClain
Counsel of Record
P. O. Box 608
Charleston, SC 29402
(803) 577-3170

QUESTIONS PRESENTED

1. Did the decision below conflict with this Court's decisions in St. Mary's Honor Center v. Hicks and Texas Dep't of Community Affairs v. Burdine, and conflict with the majority of courts of appeals applying those decisions, by requiring proof of "pretext-plus," and overturning a jury's verdict that was based on the jury's view that the employer lied in his trial testimony about his reasons for discharging older employees and that the employer had discriminated against those employees because of their age?

2. Did the decision below, setting aside the jury's verdict, conflict with this Court's decision in Anderson v. Bessemer City (which reversed the Fourth Circuit) and conflict with the other courts of appeals, by requiring that the employees "introduce evidence [sufficient] to convince us" (the court of appeals), even though the evidence convinced the jury that the employer discriminated on the basis of age, from the jury's view of the credibility of witnesses and inferences from circumstantial evidence?

If this Court grants review of either or both of the above questions, Petitioners also seek review of the following question:

3. When the jury finds that a high-level corporate officer (and shareholder) intentionally discriminated against older workers by firing them because of their age, may that officer be held individually liable for damages under the ADEA?

PARTIES

The parties are shown in the caption. Marvel Lighting Corporation is, Petitioners are informed and believe, a wholly owned subsidiary of the Marcliff Corporation.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is reported at 30 F.3d 507 (July 22, 1994), and is reprinted at App. 1.

The Order of the United States District Court for the District of South Carolina, entered June 15, 1993, is reprinted at App. 14.

JURISDICTION

The Opinion of the United States Court of Appeals for the Fourth Circuit was dated July 22, 1994. This Court's certiorari jurisdiction arises under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This matter involves the enforcement of the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. The pertinent portions of the Act are printed at App. 27, particularly 29 U.S.C. §§623(a), 626(c), and 630(b).

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 29 U.S.C. §626(c)(1), the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§621 et seq.; under 28 U.S.C. §1331 (general federal question jurisdiction) and 28 U.S.C. §1337 (acts regulating commerce).

Petitioners Alan Birkbeck[1] and J.C. Richardson had been employed by Marvel Lighting Corporation since the early

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[1] Alan Birkbeck died during the pendency of this action, and his widow, Patricia Birkbeck, was appointed personal representative of his estate and substituted as a party. References in the text to "Petitioner" Birkbeck are to the deceased employee.

1970's as salaried supervisors in the company's manufacturing department. The company manufactured light bulbs at a plant in Mullins, S.C. When fired in March, 1989, Birkbeck was 62 and Richardson was almost 56.

Respondent Bruce Fennessey, vice-president of Marvel, had been regularly active in Marvel's affairs since 1982. Marvel had had many fluctuations in the size of the manufacturing work force, from 137 to 213, but the company had never permanently eliminated any management positions before 1989.

Both Petitioners had performed a variety of duties for Respondents. Birkbeck had served as Quality Control manager, manager of aluminizing, Tooling Engineer, Manufacturing Engineer, Research and Development, and a number of other positions -- whatever the company asked him to do. Birkbeck had been told that, if the company ever closed aluminizing, there were "plenty of other jobs" for him to do. (JA 378)[2] Respondents conceded below "that there was enough evidence presented for the jury to conclude that [Birkbeck] was performing satisfactorily." (App. 21 n. 2.)

Over the years, Richardson had been promoted and demoted. From 1975 through 1989 his job title was "production supervisor," whether he was supervising the entire first shift, or just running production as a "unit supervisor" on two manufacturing units. Richardson had not been a "shift supervisor" since November, 1987, when his duties were

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[2] References to "JA" are to the Joint Appendix filed in the Court of Appeals.

assumed by Doug Hayes, the other first shift supervisor.[3] Richardson was admittedly an excellent supervisor.

Marvel was under economic pressure from a price war in the lighting industry, beginning in 1987. In March, 1989, Respondents closed the aluminizing department temporarily,[4] and reduced "indirect labor" costs (supervisors on the plant floor). When discrimination charges were filed, Respondents asserted that they had eliminated the positions of Birkbeck and Richardson, and temporarily laid off two hourly supervisors called "group leaders." The company refused to recall Petitioners when the work force expanded a few months later.

Petitioners argued that the company had fired Petitioners -- two of Marvel's most experienced and productive workers -- while retaining many less productive younger supervisors in positions that Petitioners were filling (unit supervisors) or in newly created positions for which both Petitioners qualified.[5]

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[3] On March 31, 1989, when Richardson was fired, four of the five other employees who had the title "production supervisor" (all but Hayes) just ran production on individual manufacturing units. All four were much younger than Richardson, one age 37 with low performance ratings. Controlling for length of supervisory service, Richardson's salary was comparable to the other "production supervisors" who only ran units.

[4] The aluminizing department was reopened by June, 1989, and remained open for more than eighteen months, through March, 1991. (JA 166-67.)

[5] The company created a new salaried "production supervisor" position on April 3, 1989, and promoted a younger employee, Thomas Bessetti, to that position. Bessetti had been demoted a total of three times. The company set up a new position for a supervisor (Bethea, age 36) to run tests on the aluminizing processes.

There were five key evidentiary points that were contested: (1) Was Richardson dismissed while younger "production supervisors" with poorer records were retained with the same duties? (2) Did Fennessey really believe that Richardson was still a shift supervisor in 1989, in spite of Fennessey's regular contact with the plant? (3) Did Marvel have a "no-demotion" policy, or was this alleged policy (which had never been applied to anyone at Marvel before 1989) a pretext for not assigning the Petitioners to new positions? (4) Since Birkbeck had been reassigned repeatedly in the past as the plant's "troubleshooter," was his alleged poor performance a legitimate concern (JA 307), or simply a pretext to fire him when his performance was fully satisfactory for another assignment? (App. 21 n.2)[6] and, ultimately (5) Did the company really eliminate two jobs, or did it just decide to eliminate two older workers? These points were all material, all contested at trial, and all involved assessments of the credibility of witnesses and inferences from the evidence.

Petitioners relied upon other circumstantial evidence as further corroboration, including: (1) Statistical evidence that the chance of randomly eliminating only Petitioners' jobs without regard to age was only one in 100, and was statistically significant. (See App. 39-42.) (2) The 1989 "reduction in force" was only temporary. And (3) Respondents eliminated

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[6] Birkbeck's counsel, in closing argument, told the jury that his theory was that the company decided to fire Petitioners, two older workers, and then came up with a pretextual justification after discrimination claims were filed. (See Trial Transcript, argument, pp. 549-50.) He argued Birkbeck had done a good job with aluminizing, and the company fabricated a tale of poor performance to justify not assigning Birkbeck other work. He did not argue, as the district court and the court of appeals claimed, the company decided to shut down aluminizing in order to justify firing Birkbeck.

two more management positions by firing employees, Hayes at age 56 and Linskey at age 59.[7]

The charge to the jury emphasized that liability required intentional age discrimination. (See App. 31-37.) The jury was instructed not to return a verdict without a finding of pretext. (App. 36) The jury returned a verdict for actual damages for both Petitioners against both Respondents. The jury found for Respondents on the issue of willfulness.

The trial judge granted Respondents' Motion for Judgment as a Matter of Law. He emphasized the company's need to reduce costs. He held that Petitioners did not make out a prima facie case, since he found the company had a "no-demotion policy" (App. 18) and that Richardson was still shift supervisor for the "old side." (App. 16, 23) Assuming Petitioners had made out a prima facie case, and had proved pretext, even such proof was not sufficient because the remaining management was "a balanced work force" in terms of age. (App. 24, 25-26)

On appeal, the Court of Appeals emphasized the company's need to reduce costs. Since Fennessey had hired two older managers, he was not a "credible target for charges of pretextual firing," and "Plaintiffs have not introduced any evidence to convince us otherwise." [Emphasis added.] (App. 12) It held that Fennessey, although an "employer" under 29

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[7] Fennessey admitted that everyone he terminated involuntarily by "eliminating a position" was over age 55. Both older employees hired by Fennessey left the company before trial, Linskey involuntarily and Shiavo by retirement. It was in this context that Petitioners argued that the jury should interpret Fennessey's remark that "we have got to make room for younger people."

U.S.C. §630(b) of the ADEA, could not be held individually liable in damages.

This petition followed.

REASONS FOR GRANTING THE WRIT

The writ of certiorari should be granted because the decision below conflicts with this Court's decision in St. Mary's Honor Center v. Hicks, and the decision below conflicts with the majority of the courts of appeals applying Hicks. This Court should resolve the substantial conflict among the courts of appeals about whether Hicks requires a showing of "pretext-plus." This Court should also grant certiorari because the decision conflicts with this Court's decision in Anderson v. Bessemer City and with decisions of other courts of appeals endorsing jury application of this Court's framework for proof of employment discrimination by circumstantial evidence in McDonnell-Douglas v. Green and its progeny.

1. This Court's decision in Hicks, as construed by a majority of the courts of appeals, requires that when a properly instructed jury finds pretext, the jury's verdict should be sustained.

The jury was instructed to find for plaintiffs only if it found intentional discrimination, and to find discrimination only if it found that the reasons stated at trial by Fennessey for terminating Petitioners were pretexts. The jury's verdict against Fennessey personally is a clear demonstration that the jury found that Fennessey lied.

In St. Mary's Honor Center v. Hicks, 509 U.S. ___, 113 S.Ct. 2742, 2749 and n.4, 125 L.Ed.2d 407 (1993), this Court held that,

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may together with the elements of the prima facie case, suffice to show intentional discrimination.... [But] [e]ven though ... rejection of the defendant's proffered reasons is enough at law to sustain a finding of discrimination, there must be a finding of discrimination. (Emphasis in original note.)

This Court noted that the Hicks decision would guide the instruction of the jury. 113 S.Ct. at 2751. In this case the jury was properly instructed that (App. 34, 36):

> If you find from the evidence that the reasons given by the defendant for the layoff of plaintiffs were not true, that fact may be considered by you along with all of the other evidence in arriving at your verdict in this case.
>
> * * * * *
>
> If Defendants offer a legitimate non-discriminatory reason for their actions, the plaintiffs, in order to prevail, must prove by a preponderance of the evidence that defendant's stated reasons were a pretext or a coverup for their discrimination. [Emphasis added.]

Under these instructions, since the jury found age discrimination, the jury also necessarily found pretext. Both Petitioners argued that they should have been offered

demotion, rather than fired, since a younger employee (Bessetti) had repeatedly been demoted. The trial judge presented this issue squarely to the jury. (App. 36-37) However, after the jury found in Petitioners' favor, the trial court, in an order entered ten days before Hicks was decided, applied a "pretext-plus" approach to set aside the verdict.

There is a plain conflict in the courts of appeals on the "pretext-plus" doctrine. Most of the other courts of appeals, presented with a verdict on these instructions, would have routinely enforced the jury's verdict.[8] The Court of Appeals here, however, followed the "pretext-plus" rule to override the jury's determination of credibility on the issue of pretext.[9]

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[8] These courts include the Second, Third, Seventh, Eighth, Ninth, and Eleventh Circuits. Cabrera v. Jakabovitz, 24 F.3d 372, 385 (2d Cir. 1994); Gallo v. Prudential Residential Services, 22 F.3d 1219, 1226 (2d Cir. 1994); Seman v. Coplay Cement Co., 26 F.3d 428, 433 (3d Cir. 1994); McNabola v. Chicago Transit Authority, 10 F.3d 501, 514 (7th Cir. 1993); Hicks v. St. Mary's Honor Center, 2 F.3d 265 (8th Cir. 1993); Washington v. Garrett, 10 F.3d 1421, 1433 (9th Cir. 1993); Hairston v. The Gainesville Sun Publishing Co., 9 F.3d 913, 921 (11th Cir. 1993).

[9] Prior to Hicks, the Fourth Circuit followed the "pretext-plus" rule of minority of courts. See Spencer v. General Electric Co., 894 F.2d 651, 659 (4th Cir. 1990), discussed in Olivera v. Nestle Puerto Rico, Inc., 922 F.2d 43, 49 (1st Cir. 1990). "Pretext-plus" is still the rule in the First and Tenth Circuits. LeBlanc v. Great American Insurance Co., 6 F.3d 836 (1st Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1398, 128 L.Ed.2d 72 (1994); Durham v. Xerox Corp., 18 F.3d 836 (10th Cir. 1994). The Fifth Circuit has expressed both conflicting views post-Hicks. Compare Barrow v. New Orleans Steamship Ass'n, 10 F.3d 292, 298 n. 22 (5th Cir. 1994), with Moham v. Steego Corp., 3 F.3d 873 (5th Cir. 1993).

The Court of Appeals below recognized that Petitioner Richardson's evidence "if credited," refuted Respondents' stated reason for firing him. Such proof, however, "would still not suffice to recast Fennessey's belief in a discriminatory light or to render Marvel's decision anything other than an economic one." (App. 11) In other words, (1) even though the jury found that Richardson's position as shift supervisor had been eliminated for more than a year, and that the plant manager knew that the job had been eliminated, the jury could not infer that Fennessey was lying when he said he did not know the position had been eliminated[10], and (2) Petitioners needed proof, beyond refutation of the proffered reason, to show that "Marvel's decision [was] anything other than an economic one."

Petitioners met Hicks' rule that the jury can find discrimination from the circumstantial evidence of the elements of the prima facie case plus pretext. As the District Court noted in its order overturning the jury verdict, both Petitioners met the first three elements of the prima facie case: (1) they were in the protected category, (2) they met applicable job qualifications and, according to the favorable evidence, were performing their jobs satisfactorily, and (3) despite these qualifications, they were discharged. (App. 21) McDonnell-Douglas v. Green, 411 U.S. 792, 802 (1973), as adapted to ADEA cases; compare Cova v. Coca-Cola Bottling Co., 574 F.2d 958, 959 (8th Cir. 1978).

Generally, the Courts of Appeals have also required a fourth element of the prima facie case, such as some more

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[10] The jury did not believe Fennessey, as indicated by the jury's verdict against him personally. The decision below is clearly at odds both with Hicks and with the teaching of Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981), that effective cross-examination at trial may establish pretext.

favorable treatment of a sufficiently younger employer.[11] Here, the fourth element was satisfied, inter alia, by proof that Richardson, when fired, was working as a "unit supervisor" and many younger "unit supervisors" with lower performance evaluations were retained, and by proof that both Petitioners were qualified for a new "production supervisor" position that was assigned to Bessetti, a younger employee, the Monday after Petitioners were fired on Friday.

This Court should grant certiorari to resolve the conflict in the lower courts as to the role of proof of pretext, in addition to a prima facie case, in jury trials.

2. This Court should grant certiorari to resolve conflicts among the circuit courts regarding the jury's role in discrimination cases based on circumstantial evidence.

This Court has repeatedly admonished the Fourth Circuit, and other lower courts, not to take away decisions from fact-finders by substituting the views of appellate judges. Anderson v. Bessemer City, 470 U.S. 564, 573 (1985): A reviewing court may not "reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." But that is precisely what happened here, when the jury, who heard Fennessey testify, was convinced that he had lied, but the Court of Appeals held that "Plaintiffs have

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[11] In a reduction-in-force setting, the Fourth Circuit has stated this requirement, in Duke v. Uniroyal, Inc., 928 F.2d 1413, 1417 (4th Cir. 1991), as

> (4) that persons outside the protected age class were retained in the same position or that there was some other evidence that the employer did not treat age neutrally in deciding to dismiss the plaintiff.

not introduced any evidence to convince us otherwise." (Emphasis added.) (App. 12)

The decision below reflects a conflict among the circuits whether to follow the traditional rules in age discrimination cases by allowing juries to assess credibility. The conflict is particularly acute as to allowing juries to apply this Court's framework for proof of employment discrimination by circumstantial evidence. Since juries will be increasingly prominent in determining such cases after the 1991 amendments to the Civil Rights Act of 1964 and to the Americans with Disabilities Act, it is critical that this Court resolve this conflict in support of the traditional role of the jury, and give clear and strong guidance to the lower courts.

As this Court recently affirmed in St. Mary's Honor Center v. Hicks, 509 U.S. ___, 113 S.Ct. 2742, 2746 (1993), in employment discrimination cases the ultimate focus is "the inquiry into the elusive factual question of intentional discrimination." To determine these facts, this Court has

> "devised a framework that would allow both plaintiffs and the courts to deal effectively with employment discrimination revealed only through circumstantial evidence." St. Mary's Honor Center v. Hicks, 509 U.S. ___, 113 S.Ct. at 2747 (Souter, J., dissenting).

In age discrimination cases, Congress has assigned the fact-finding role to juries. Lorillard v. Pons, 434 U.S. 575 (1978).[12] This Court has recently emphasized that

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[12] After the Lorillard case was argued, Congress adopted an amendment that explicitly provided for jury trials. See 29 U.S.C. §626(c)(2). (App. 29)

> ""Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.""

Local No. 391 v. Terry, 494 U.S. 558, 565, 110 S.Ct. 1339, 1344-45 (1990). As this Court also recently emphasized, in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986):

> "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."

The Court of Appeals for the Fourth Circuit and other courts[13] are simply unwilling to allow a jury to find age discrimination solely on the circumstantial evidence of the McDonnell-Douglas - Burdine - Hicks framework. Indeed, the decision below echoes the lack of respect shown for the role of the fact-finder by the Fourth Circuit in Anderson v. Bessemer City. Other courts of appeals, for example the Seventh and Eighth Circuits,[14] are content to allow the jury to serve its traditional function in most age discrimination cases.

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[13] See, e.g., LeBlanc v. Great American Ins. Co., 6 F.3d 836 (1st Cir. 1993).

[14] See, e.g., Castleman v. Acme Boot Co., 959 F.2d 1417, 1423 (7th Cir. 1992); Giacoletto v. Amax Zinc Co., Inc., 954 F.2d 424, 427-28 (7th Cir. 1992); Brown v. M & M/Mars, 883 F.2d 505 (7th Cir. 1989); Brown v. Stites Concrete, Inc., 994 F.2d 553 (8th Cir. 1993).

The decisions in this case below are representative of many recent decisions in which judges have usurped the role of the jury in ADEA cases. This was a fairly typical case in that the employer maintained no contemporaneous documents (except documents that were at best ambiguous, and at worst, contradictory) and the decision-maker put his credibility and demeanor on the line by taking the stand to defend his actions.

In order to avoid the ineluctable conclusion that juries must be entitled to assess pretext, the courts below, contrary to the proof in this case and contrary to the findings of the jury, adopted a set of presumptions to defeat access to the jury. These presumptions effectively posed additional burdens of production on Petitioners, contrary to this Court's decision in United States Postal Service v. Aikens, 460 U.S. 711 (1983). If such presumptions are countenanced by this Court, no employee can expect to obtain or sustain a jury verdict, if a judge weighs the evidence differently.

The courts below adopted these presumptions: (1) when the employer starts with a "balanced work force" and retains a "balanced work force," a showing of pretext is not sufficient (App. 25-26); (2) if the employer has hired some older employees in recent years, he cannot be a "credible target for charges of pretextual firing" (App. 12); (3) if the employer shows economic difficulties, any firing is presumed justified, even if the jury finds that the employer lied about eliminating an employee's job; (4) when the employer is small, the employee cannot use statistics to bolster his case; (5) if the decision-maker has made ambiguous statements about age, they are presumed only a "fact of life." All of these presumptions are contrary to decisions of other courts of appeals, as shown in the following discussion.

a. Balanced Work Force/Hiring Older Workers

The "balanced work force" evidence is admissible, but not conclusive, as this Court held in Furnco Construction Co. v. Waters, 438 U.S. 567, 579 (1978) ("A racially balanced work force does not immunize an employer from liability for specific acts of discrimination.") See also Healy v. N.Y. Life Ins. Co., 860 F.2d 1209, 1217-18 (3d Cir. 1988); Ashbury v. Brougham, 866 F.2d 1276, 1281-82 (10th Cir. 1989) (housing discrimination).

The Court of Appeals presumed that "employers who knowingly hire workers within a protected group seldom will be credible targets for charges of pretextual firing," quoting the author's own opinion in Proud v. Stone, 945 F.2d 796, 798 (4th Cir. 1991). The Court continued (App. 12): "Plaintiffs have not introduced any evidence to convince us otherwise." As the Eighth Circuit has explained, in Brown v. Stites Concrete, Inc., 994 F.2d 553, 567 n.8 (8th Cir. 1993):

> The weakness of this reasoning becomes apparent when it is extended to other protected groups. No one would argue that an employer who hires a minority or a woman is incapable of intentionally discriminating against that employee in the workplace.

b. Selections for Reduction in Force

Other courts of appeals have held that neither economic difficulties nor a "balanced workforce" immunize an employer from a finding of discrimination. As the First Circuit noted in Hebert v. Mohawk Rubber Co., 872 F.2d 1104, 1116 (1989):

> ... this Court can readily conceive of cases in which an employer, faced with a bona fide business crisis, impermissibly determines to avert disaster by acting in a discriminatory way, mistakenly equating age with lack of productivity.

The Seventh Circuit reached an analogous conclusion in Ayala v. Mayfair Molded Products, Inc., 831 F. 2d 1317, 1320 (1987).

These other courts of appeals have recognized that where the alleged reasons for firing long-time effective employees are challenged, undisputed evidence of economic difficulties cannot be conclusive of the employer's bona fides. Otherwise, employers would be completely immunized from employment discrimination suits whenever they implement authentic reductions in force.

c. Statistics

There is a clear conflict among the courts of appeals about whether a fact-finder may rely at all on statistics from small groups. The First and Fifth Circuits have held that it may; the Ninth Circuit and the court below held that it may not. No prior reported appellate case, though, has held that evidence that is "statistically significant" and has been admitted into the record -- as here (App. 39-42) -- cannot be relied upon to sustain a judgment for the employee.

The district court completely ignored the statistical testimony, although it was admitted into evidence and no objection was preserved. The Court of Appeals held that the jury could not even consider the testimony because it "involved too small a sample size to have any probative value here." (App. 7-8) It relied on two Ninth Circuit cases, Shutt v. Sandoz

Crop Protection Corp., 944 F.2d 1431 (9th Cir. 1991); and Palmer v. United States, 794 F.2d 534, 539 (9th Cir. 1986).

Here, as in Freeman v. Package Machinery Co., 865 F.2d 1331, 1338 (1st Cir. 1988), the expert analyzed the entire universe (20 here, 18 in the Freeman case); the court held objections to size of the group "affect not the admissibility of his testimony, but the weight which the jury might choose to give it." (Emphasis in original.) The Fifth Circuit reached the same conclusion, where evidence from a group of 28 was not statistically significant. Bunch v. Bullard, 795 F.2d 384, 195 (5th Cir. 1986). The Court observed:

> "We cannot permit an employer to escape liability for discriminatory tactics merely because his work force is not vast enough to provide meaningful data for a sophisticated statistical evaluation."

d. Fennessey Remark

Birkbeck testified that Fennessey stated to him, in discussing Birkbeck's future with the company, that "there comes a time when we have to make way for younger people." Fennessey denied making the remark when he testified before the jury. The Court of Appeals insisted that "Fennessey's comment reflects no more than a fact of life...." (App. 9)[15]

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[15] The Magistrate Judge and the District Judge who ruled on the Motion for Summary Judgment disagreed: they found the statement "appears to reveal a bias against older workers which might serve as direct evidence of Defendant's motivation and intent in terminating both the Plaintiffs." (JA 35 and 42.)

The Fourth Circuit has been very restrictive in allowing juries to draw inferences from age-conscious statements. In E.E.O.C. v. Clay Printing Co., 955 F.2d 936, 942 (4th Cir. 1992), the majority found that no bias could be inferred from statements that "too many people have been around here too long and make too much money," and attracting "newer, younger people" with "young blood." Judge Restani (sitting by designation) dissented, noting that the statements had "an obvious connection to age...." 955 F.2d at 949.

Other courts of appeals, addressing similar remarks, have held that the meaning of such remarks is for the jury. The Seventh Circuit stated the opposing view plainly in Shager v. Upjohn Co., 913 F.2d 398, 402 (7th Cir. 1990), "the ambiguities in a witness's testimony[16] must be resolved against the moving party." See also Buckley v. Hospital Corp. of America, Inc., 758 F.2d 1525, 1527-28 (11th Cir. 1985); Alphin v. Sears, Roebuck & Co., 940 F.2d 1497, 1500-1 (11th Cir. 1991); Hebert v. Mohawk Rubber Co., 872 F.2d 1104, 1115 (1st Cir. 1989); Siegel v. Alpha Wire Corp., 894 F.2d 50, 55 (3d Cir. 1990).

Conclusion

Many courts of appeals, like the courts below, do not wish to have juries assess intent on the basis of McDonnell-Douglas v. Green, 411 U.S. 802 (1973), and its progeny. These courts, like the court below, do not want juries "to obstruct the ability of a commercial enterprise to make necessary adjustments in the fact of economic challenges." (App. 13)

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[16] The remarks were, "These older people don't much like or much care for us baby boomers" and "the old guys know how to get around things." 913 F.2d at 400.

But "The ADEA expressly and deliberately created a cause of action to be tried to a jury so that issues of age discrimination would not be disposed of by federal judges." Healy v. N.Y. Life Ins. Co., 860 F.2d 1209, 1220 (3d Cir. 1988) (dissent). When Congress passed 29 U.S.C. § 626(c)(2), a sponsor noted, idem.:

> Sometimes, a judge may be slightly callous, perhaps because he himself is protected by life tenure, or because he is somewhat removed from the usual employer-employee relationship. The Jury may be more neutral in such circumstances.

The action of the courts below, and many other lower courts, were clearly foretold by the dissenting judge in the Healy case, 860 at 1227:

> Where Congress has expressly found "a jury may be more neutral" than a judge, we should not be concerned that every charge of age discrimination arising out of a reduction in force will require a jury trial. We should be concerned that any corporation with an economic incentive for age discrimination will be able to mask it by arranging for a temporary reduction in force and/or reorganization with the assurance that if a charge of age discrimination is made, it can be tried to a court by self-serving post-litigation [statements] of "fact."

This Court has carefully crafted the framework for assessment of circumstantial evidence of employment discrimination. Together with the Congressionally-mandated

right to a jury trial -- now applicable in most employment cases alleging intentional discrimination -- this framework can be an effective means of redress for victims of employment discrimination, and an effective deterrent of unlawful discrimination. But if courts like those below are allowed to usurp the role of the jury -- to require that the employee introduce "evidence to convince us," the appellate judges rather than the juries (App. 12) -- the framework will no longer be worth the paper that McDonnell-Douglas and its progeny are printed on.

This Court should grant certiorari to reaffirm that the traditional role of juries is to be respected in employment discrimination cases, and that juries, when properly instructed, are to be given as much respect -- or even more -- in determining discriminatory intent as the district courts have been given under Anderson v. Bessemer City, 470 U.S. 564 (1985).

3. **The personal liability of corporate officers in cases under the ADEA is an important question to be decided by this Court.**

The Court of Appeals noted (App. 5) that

> "the ADEA makes it unlawful for an "employer" to discriminate on the basis of age against its employees. See 29 U.S.C. §623(a). The Act defines the term "employer ... [to include] (1) any agent of [an employer]..." 29 U.S.C. §630(b)."

The Court of Appeals held that Fennessey could not be held personally liable because Congress intended "to reduce the burden of the ADEA on small businesses." (App. 5-6)

> Given this evident limitation, it would be incongruous to hold that the ADEA does not apply to the owner of a business employing, for example, ten people, but that it does apply with full force to a person who supervises the same number of workers in a company employing twenty or more.

Since the ADEA was enacted primarily under the Commerce Power, it is equally likely, in the absence of express discussion, that Congress intended to limit the scope of the ADEA to enterprises with a larger impact on interstate commerce, and used the number of employees as an easily administered measure of impact. Individual liability for corporate officers is the rule under the Fair Labor Standards Act, the model for the ADEA. Miller v. Maxwell's Intern., Inc., 991 F.2d 583, 589 (9th Cir. 1993) (Fletcher, J., dissenting), cert. denied, ___ U.S. ___, 114 S.Ct. ___ (1994):

> [I]t was Congress' selectivity "in incorporating provisions and in modifying certain FLSA practices [that] suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA." Lorillard [v. Pons], 434 U.S. at 582, 98 S.Ct. at 871 (emphasis added [by Judge Fletcher]). There is no question that an individual can be personally liable as an employer under the FLSA; .... House [v. Cannon Mills Co.], 713 F.Supp. [159], at 160-61 (citing cases). The same result should apply to actions brought under the ADEA.

Fennessey was a top corporate officer[17] who exercised on-site authority at Marvel, over all two hundred employees. There is no reason to assume that Congress intended to shield him from personal liability if he engaged in intentional acts of discrimination against older workers because of their age.

As reflected in Miller v. Maxwell's Intern., Inc., supra, and the present case, individual liability of supervisors, especially corporate officers, raises an important question of statutory construction that has never been resolved by this Court. This Court should grant certiorari to provide guidance to the lower courts on this question.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

Ray P. McClain
Counsel of Record
P. O. Box 608
Charleston, SC 29402

Herbert W. Louthian, Sr.
P. O. Box 1299
Columbia, SC 29202

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[17] According to his deposition (pages 45-6), he was also a minor shareholder in the parent corporation, Marcliff. This fact was not introduced at trial because Fennessey did not raise this defense until after the verdict.

APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

PATRICIA BIRKBECK, as Personal Representative of the Estate of Alan Birkbeck, Deceased; J. C. RICHARDSON, Plaintiffs-Appellants,	No. 93-1856
v.	
MARVEL LIGHTING CORPORATION; BRUCE T. FENNESSEY, Defendants-Appellees.	

Appeal from the United States District Court for the District of South Carolina, at Florence. Richard B. Kellam, Senior District Judge, sitting by designation.

(CA-90-2082-4)

Argued: May 9, 1994

Decided: July 22, 1994

Before WILKINSON and MICHAEL, Circuit Judges, and DUPREE, Senior United States District Judge for the Eastern District of North Carolina, sitting by designation.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Michael and Senior Judge Dupree joined.

COUNSEL

ARGUED: Ray P. McClain, Charleston, South Carolina, for Appellants. Lovic Alton Brooks, III, CONSTANGY, BROOKS & SMITH, Columbia, South Carolina, for Appellees. **ON BRIEF:** Herbert W. Louthian, LOUTHIAN & LOUTHIAN, Columbia, South Carolina, for Appellants. Kristine L. Thompson, CONSTANGY, BROOKS & SMITH, Columbia, South Carolina for Appellees.

OPINION

WILKINSON, Circuit Judge:

In this case we must decide whether the district court appropriately granted judgment as a matter of law to defendants in an Age Discrimination in Employment Act case. See 29 U.S.C. §621 et seq. Because we find that plaintiffs lacked any substantial evidence of age bias and because defendants demonstrated that their actions were a legitimate response to difficult economic circumstances, we affirm the judgment of the district court.

I.

Plaintiffs Alan Birkbeck and J.C. Richardson both held salaried, supervisory positions at Marvel Lighting Corporation in Mullins, South Carolina. Marvel is a privately owned

company that manufactures light bulbs. Birkbeck was the manager of the aluminizing department, and Richardson served as a production supervisor. In March 1989, Marvel discharged both plaintiffs. Bruce Fennessey, a Marvel vice-president, was primarily responsible for the layoff decisions. At the time of the layoffs, Birkbeck was 62 years old and Richardson was 55.

Both plaintiffs filed suit against Marvel in South Carolina federal court. The complaint, which was subsequently amended to add Fennessey as a defendant, alleged that the defendants had "negligently, recklessly, or willfully deprived Plaintiffs of equal employment opportunities" because of their age. This action, Birkbeck and Richardson argued, violated the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. (the "ADEA").

The case was tried to a jury in April 1993. At trial, Birkbeck and Richardson claimed that they were both performing adequately at the time of the discharge, and noted that they were two of the oldest supervisors working on the plant floor. Plaintiffs also claimed that statistical evidence showed that the layoffs at Marvel disproportionately impacted older workers. Birkbeck testified that, at one point several years before the layoffs, Fennessey had told him, "there comes a time when we have to make way for younger people," and argued that this comment demonstrated age bias. Birkbeck further contended that his termination was related to the fact that his pension would have vested in three years. Richardson maintained that younger supervisors with poorer performance records were retained in the same position he had held.

Defendants responded that economic necessity dictated the company's actions and that the firings had nothing to do with age. Marvel argued that it was in the midst of a price war with larger competitors in its industry, and maintained that the

entire aluminizing department, including Birkbeck, had been laid off. It also argued that Richardson's job had been consolidated with another supervisory position, and that the supervisor who had been retained in that position was himself 53 years old.

The jury ultimately found in favor of both plaintiffs and awarded $113,755.65 to Richardson and $60,077 to Birkbeck. However, the jury declined to find that any willful violation of the ADEA had occurred. Defendants then moved for judgment as a matter of law or for a new trial, and plaintiffs moved for a new trial on the issue of whether there had been a willful violation of the ADEA.

The district court granted the defendants' motion for judgment as a matter of law in June 1993. The court found both that no ADEA prima facie case had been made out by the plaintiffs and that the defendants had articulated nonpretextual reasons for the actions taken. Regarding Birkbeck, the court found that no ADEA violation had been shown because (1) Marvel shut down the entire aluminizing department and there was no evidence that Birkbeck's position as an aluminizing department manager had been filled by a younger person, (2) Fennessey's statement was a simple "truism" and could not be considered evidence of age discrimination, and (3) there was no evidence that Marvel's actions were related to the fact that Birkbeck's pension benefits would have vested within the next several years. Regarding Richardson, the district court found that no discrimination could be shown because (1) his supervisory position had been combined with another position, (2) the person who remained in the new position was only two years younger than Richardson, and (3) the statistics regarding the employment pattern at the company "show[ed] a balanced work force, at least in terms of age, not a policy of discrimination based on age." Finally, the district court found

that, even if a prima facie case could have been established, the economic problems Marvel was experiencing demonstrated that "plaintiffs were victims of economic necessity, not illegal discrimination."

Plaintiffs now appeal.

II.

As an initial matter, we must decide whether Fennessey is a proper defendant in this action. The ADEA makes it unlawful for an "employer" to discriminate on the basis of age against its employees. See 29 U.S.C. §623(a). The Act defines the term "employer" as "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year .... The term also means (1) any agent of such a person ..." 29 U.S.C. §630(b).

The few courts that have found individual liability under the ADEA tend to seize on the use of the word "agent" in §630(b). See, e.g., House v. Cannon Mills Co., 713 F. Supp. 159, 160-62 (M.D.N.C. 1988). They have reasoned that, under the ADEA, those with the authority to make discharge decisions for their employers are individually liable as their employer's "agents." Id. at 161-62.

While plaintiffs urge us to adopt this view, we find its rationale unpersuasive. Section 630(b) restricts the application of the ADEA to those "employers" who employ twenty or more workers. The purpose of this provision can only be to reduce the burden of the ADEA on small businesses. Given this evident limitation, it would be incongruous to hold that the ADEA does not apply to the owner of a business employing, for example, ten people, but that it does apply with full force

to a person who supervises the same number of workers in a company employing twenty or more. See Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993)("If Congress decided to protect small entities with limited resources from liability, it is inconceivable that Congress intended to allow civil liability to run against individual employees.") Such personal liability would place a heavy burden on those who routinely make personnel decision for enterprises employing twenty or more persons, and we do not read the statute as imposing it. Instead, we read §630(b) as an unremarkable expression of respondeat superior -- that discriminatory personnel actions taken by an employer's agent may create liability for the employer. See id. at 587-88; see also York v. Tennessee Crushed Stone Ass'n, 684 F.2d 360, 362 (6th Cir. 1982). Employer liability ensures that no employee can violate the civil rights laws with impunity, a safeguard that has proven sufficient with respect to Title VII, the ADEA closest statutory kin. See Harvey v. Blake, 913 F.2d 226, 227-28 (5th Cir. 1990) (holding that the similar provisions in Title VII, 42 U.S.C. §2000e(b), mean that individuals acting as employer "agents" will be liable in their official capacities only); Padway v. Palches, 665 F.2d 965, 968 (9th Cir. 1982) (same).[1] We therefore hold that the ADEA limits civil liability to the employer and that Fennessey, as a Marvel employee, is not a proper defendant in this case.

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[1] An employee, however, may not be shielded as an employer's agent in all circumstances. We address here only personnel decisions of a plainly delegable character. See Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989) (disputed issue of fact with respect to personal liability under Title VII in a sexual harassment setting), vacated on other grounds, 900 F.2d 27 (4th Cir. 1990).

III.

Appellate courts have been cautioned not to immerse themselves in the minutiae of the various proof schemes set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and its progeny. The question before us is a straightforward one -- whether plaintiffs successfully demonstrated that they were the victims of age discrimination on the part of Marvel. See United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983).

Birkbeck and Richardson contend that they both introduced evidence sufficient to prove such discrimination. They note that the district court was required to view the evidence in the light most favorable to them and that their evidence, when so viewed, would have supported the jury's findings. Specifically, plaintiffs contend that the district court failed to place enough weight on their statistical evidence, was too dismissive of the comment made by Fennessey, and ignored other testimony which was supportive of their claim.

We cannot agree. When viewed in its entirety, this case is plainly one about economic problems causing layoffs, not one of animus leading to the discharge of employees based on age. We agree with the district court that plaintiffs provided only weak evidence of discrimination while defendants presented undisputed evidence that the cutbacks at Marvel were driven by the company's economic difficulties.

A.

We begin by examining plaintiffs' evidence in some detail. Plaintiffs argue that statistical evidence demonstrates the presence of discriminatory practices at Marvel. The plaintiffs' data, however, simply involved too small a sample

size to have any probative value here. Richardson and Birkbeck were part of a group of fifteen individuals terminated by Marvel in 1989. Of those fifteen, eleven were part of the company's collective bargaining unit, meaning that the choice of who would be laid off was not dictated by Marvel management. Plaintiffs are thus left to derive statistical significance for the layoffs of only the four individuals not in the collective bargaining unit. This is a difficult task, given that small changes in the numbers will have a potentially huge effect on the statistical showing. We think it improper to rely on the results of statistical analyses undertaken in these circumstances. See Palmer v. United States, 794 F.2d 534, 539 (9th Cir. 1986) (holding that plaintiff's sample sizes of between five and thirteen were "too small to have any predictive value" and must be disregarded"; see also Shutt v. Sandoz Crop Protection Corp., 944 F.2d 1431, 1434 (9th Cir. 1991).

Plaintiffs attempt to avoid this problem by introducing evidence showing that the probability of Richardson and Birkbeck both being randomly dismissed without the involvement of some age animus was small. However, the likelihood that one or two particular individuals will be laid off will always be rather small, given that the individual will always be the smallest possible unit of the larger group. The evidence thus falls short of establishing any significant pattern of discriminatory employment practices throughout an entire work force. See Rose v. Wells Fargo & Co., 902 F.2d 1417, 1423 (9th Cir. 1990). In fact, the statistical evidence fails to demonstrate any discriminatory trend. Plaintiffs' own expert conceded that, under several statistical measures, the Fisher Exact Test and the Willcoxin Test, there was no significant connection between age and the four individuals laid off. We accordingly hold that the jury was not entitled to rely on plaintiffs' statistical proffers.

B.

Fennessey's statement that "there comes a time when we have to make way for younger people" is similarly irrelevant. it is undisputed that the statement was made over two years before the discharge of Birkbeck and Richardson. This remoteness in time makes it inappropriate to use Fennessey's statement as evidence of age discrimination. See Phelps v. Yale Sec., Inc., 986 F.2d 1020, 1026 (6th Cir. 1993) (finding statements made approximately a year before the layoff at issue too remote "to have influenced the termination decision"); Guthrie v. Tifco Indus., 941 F.2d 374, 379 (5th Cir. 1991) (same). The fact that Fennessey made such a statement on only one occasion further supports this conclusion. See Gagne v. Northwestern Nat'l Ins. Co., 881 F.2d 309, 314 (6th Cir. 1989) (holding that a solitary remark regarding age was insufficient to create an issue of material fact for purposes of avoiding summary judgment).

More importantly, the statement in itself creates no inference of age bias. Fennessey's comment reflects no more than a fact of life and as such is merely a "truism[]" that carries with it no disparaging undertones. Smith v. Flax, 618 F.2d 1062, 1066 (4th Cir. 1980); see also Merrick v. Farmers Ins. Group, 892 F.2d 1434, 1438 (9th Cir. 1990) (holding that certain statements unconnected to the employment decision making process are simply stray remarks that do not demonstrate discriminatory intent); Smith v. Firestone Tire & Rubber Co., 875 F.2d 1325, 1330 (7th Cir. 1989) (same). Moreover, statements about age may well not carry the same animus as those about race or gender. Unlike race or gender differences, age does not create a true we/they situation -- barring unfortunate events, everyone will enter the protected age group at some point in their lives. Fennessey, at 52, was himself in the protected category. His remark should be seen

for the non-actionable reflection on generational passage that it was. See EEOC v. Clay Printing Co., 955 F.2d 936, 942 (4th Cir. 1992).

C.

Plaintiffs' remaining evidence is no stronger. Birkbeck was fired when the entire aluminizing department at Marvel was shut down. There is no evidence indicating that aluminizing department workers holding jobs similar to Birkbeck's were retained while he was not. In fact, the evidence clearly demonstrates that all but one worker in the aluminizing department was laid off.[2] Moreover, as the district court pointed out, it would make little sense for Marvel to shut down an entire twelve person department -- and contract out its business -- simply to rid itself of that department's 62 year old supervisor. In fact, both sides agree that the aluminizing department was experiencing significant difficulties in, among other things, applying a uniform aluminizing coat on the inside of the bulbs. As a result, we cannot identify any significant evidence supporting Birkbeck's claim of age discrimination.

Richardson's evidence is also tenuous. While it is true that some younger supervisors were retained after Richardson was fired, undisputed evidence also indicates that a majority of the remaining supervisors were in the protected class. Even if

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[2] The one employee was retained to conduct experiments in the hope that the aluminizing department could eventually be reopened. Marvel was not required to keep Birkbeck in place of this one employee or to transfer Birkbeck to another post. See Simpson v. Midland-Ross Corp., 823 F.2d 937, 942 n.6 (6th Cir. 1987). The aluminizing department was apparently reopened briefly several months later; however, continuing difficulties resulted in it being shut down again.

some of the 55-year old Richardson's duties were assumed by a younger individual, that event is hardly dispositive. In a reduction of work force case, the fact that the duties of a terminated older employee were assumed by a younger individual is not conclusive of age bias. See Chappell v. GTE Prod. Corp., 803 F.2d 261, 267 (6th Cir. 1986). If it were, it would transform the ADEA into something akin to a strict seniority protection system.

Moreover, it remains an open question whether any younger supervisors actually assumed Richardson's tasks. Marvel maintained that Richardson held a position different from all of the younger supervisors and that when his position was eliminated, the duties attached to it were combined with another supervisory position held by a 53-year old manager, Mr. Hayes. Richardson maintained that, notwithstanding a substantial salary differential, his position and those of younger supervisors were more comparable. What is clear, however, is that Fennessey had always believed that Richardson and Hayes were the only two supervisors who exercised similar general management responsibilities and therefore that a cost reduction would necessitate the elimination of one of those two jobs. Indeed, Fennessey originally wanted to lay off Hayes, but changed his mind after learning that Hayes had technical skills that Richardson did not possess. While Richardson contends that a long absence due to illness had already led to his demotion from the position Marvel claimed it was eliminating, his evidence, if credited, would still not suffice to recast Fennessey's belief in a discriminatory light or to render Marvel's decision anything other than an economic one. See St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2749 (1993) (holding that rejection of defendant's claimed nondiscriminatory reason does not compel a finding for plaintiff).

D.

In contrast to plaintiffs' proffers, Marvel provided substantial support for its claim that the layoffs here were motivated purely by economic concerns. At trial, Marvel introduced undisputed evidence that it was experiencing economic hardship. Marvel was among the smaller companies in the lighting industry and had a market share of under one percent. For several years preceding the layoffs in question here, the larger companies in the lighting industry had engaged in stiff price competition. As a result, consumer prices actually began declining after 1987, making price increases by a small company such as Marvel impossible. At the same time, however, Marvel was experiencing increased costs for both labor and raw materials. Marvel therefore decided to lower its overhead by reducing payroll costs where possible and by shutting down the aluminizing department. Marvel claimed that these decisions led directly to the termination of Birkbeck and Richardson.

We see no basis for believing that this argument is pretextual. In fact, Marvel's hiring practices make a finding of pretext even less plausible. Fennessey hired a 54-year old worker at approximately the same time he made his allegedly discriminatory statement, and had hired a 60-year old worker several years before that. Such hiring practice is significant. As we have stated, "employers who knowingly hire workers within a protected group seldom will be credible targets for charges of pretextual firing." Proud v. Stone, 945 F.2d 796, .798 (4th Cir. 1991); see also Lowe v. J.B. Hunt Transp., Inc., 963 F.2d 173, 174-75 (8th Cir. 1992). Plaintiffs have not introduced any evidence to convince us otherwise.

IV.

Given the undisputed evidence regarding Marvel's economic circumstances, its past hiring practices, and the weakness of plaintiffs' claim, the company's actions can only be viewed as a rational business decision that courts may not upset. See Abbott v. Federal Forge, Inc., 912 F.2d 867, 875-76 (6th Cir. 1990); Dale v. Chicago Tribune Co., 797 F.2d 458, 464 (7th Cir. 1986). The ADEA was not intended to obstruct the ability of a commercial enterprise to make necessary adjustments in the face of economic challenges. Marvel's layoff decisions here reflected business realities, not age discrimination, and the district court properly granted judgment as a matter of law.[3]

Its judgment is hereby AFFIRMED.

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[3] Although the district court did not rule on defendants' new trial motion, in light of the judgment as a matter of law entered in their favor, we see no reason to remand for a ruling on that motion. We similarly find no merit in plaintiffs' challenges to the district court's evidentiary rulings.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

PATRICIA BIRKBECK as personal representative of ALAN BIRKBECK, and J.C. RICHARDSON,

Plaintiffs,

v.

Civil Action
No.4:90-2082-21BC

MARVEL LIGHTING CORPORATION and BRUCE FENNESSEY,

Defendants.

OPINION AND ORDER

Asserting that they were discriminated against because of their age, Alan Birkbeck through his personal representative, and J.C. Richardson, former employees of Marvel Lighting Corporation (Marvel), instituted this action pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §621, et seq., against Marvel and Bruce T. Fennessey (Fennessey), one of its vice presidents, seeking to recover damages. After a trial by jury, the jury returned a verdict in favor of each plaintiff against each defendant. Defendants have moved for judgment as a matter of law or in the alternative a new trial. Each plaintiff has moved the court for a new trial on the issue of willfulness only and to amend that judgment to provide for pre-judgment interest and front-pay. Plaintiffs have also filed a motion for allowance of attorneys' fees. All parties have submitted briefs in support of and opposition to their respective motions and

submitted the motions to the court for determination.

At the conclusion of the presentation of the plaintiffs' evidence and again at the conclusion of a presentation of all of the evidence, defendants moved for a judgment as a matter of law. The court withheld a ruling on each of said motions pending a verdict by the jury.

I.

Since 1987, the lighting industry has been involved in a "price war" which has affected the price of light bulbs and prevented price increases even though the cost of labor, materials and sale of light bulbs has increased. Marvel, in order to compete, was confronted with the necessity of reducing overhead costs. It became the duty of defendant Fennessey to review the manufacturing operations at the plant in Mullins, South Carolina, in an effort to reduce overhead costs. He conferred with local management at the plant. They decided that consolidation of some positions would be beneficial and that certain departments could be eliminated or reduced. In the review, they determined that certain of the products being manufactured at the plant could be purchased in the market for less than it cost Marvel to manufacture the item and the aluminizing department at the Mullins facility should therefore be eliminated. They also decided to consolidate two of the top production supervisors' positions into one position. It was therefore necessary to eliminate one of the two individuals holding those positions. Other changes were made as a result of which some seventeen employees were laid off.

A.

Marvel operated at the Mullins facility an aluminizing department which carried on the process of placing an aluminum coating on the inside of light bulbs. Alan Birkbeck was the manager of this department, a position he had held since 1987. He was laid off on March 31, 1989. The hourly employees in the department were also discharged. Only one individual working in the department at the time was retained. He was the group leader, Marvin Bethea, a black man, age 36. He was retained to conduct tests for the plant manager who was to attempt to work out problems in the department with the hope operations might be resumed in the future.[1]

B.

The production department at Marvel was divided into two areas known as the old side and the new side. Plaintiff Richardson was production supervisor responsible for the old side and Doug Hayes was the production supervisor responsible for the new side. Hayes was the more senior of the two in terms of service. Each of these supervisors reported to Charles Colvin, assistant plant manager, and Dan Schiavo, plant manager. The other supervisors and group leaders in production on the old and new sides reported to Richardson and Hayes and they were paid significantly less than Hayes and Richardson. When Fennessey decided to consolidate the positions of Hayes and Richardson into one, he had in mind to retain Richardson and discharge Hayes. He met with plant manager Schiavo and manufacturing manager Linskey to obtain

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[1] Operations did resume at a later date, but were again discontinued because of the inability to produce the product at a profitable price. Marvel could purchase the product for less than the cost of manufacture.

their input. After being advised by them that Hayes possessed mechanical and technical skills essential to the operation, which Richardson did not have, and Hayes was senior to Richardson, he determined to discharge Richardson.

There was a conflict in the evidence as to the exact duties of Richardson at the time of his discharge. He was titled as and received the pay of a production supervisor which was considerably higher pay than the group leader. Richardson contended that he was not supervisor of the "old side" at the time of his discharge, but was supervising units three and four and only the "old side" supervisor in name only. Not only were group leaders paid considerably less than production supervisors, group leaders were union members and production supervisors were not. Richardson was the only production supervisor discharged on March 31, 1989.

C.

In its reduction of force on March 31, 1989, Marvel consolidated the production supervisor positions held by Richardson and Hayes into one and retained Hayes in that position. Hayes was 53 years of age. Richardson was 55 years of age. In the reduction, Marvel determined to eliminate the aluminizing department, which resulted in the elimination of Birbeck's position and resulted in his lay off. At that time, Birkbeck was 62 years of age.

In this cost reduction effort by Marvel, fifteen employees were laid off on March 31, 1989. Of that number, seven were under the age of forty. some of those were entitled to return to their former jobs at later dates because they were under a collective bargaining agreement. At this time, two production supervisors and one or two group leaders who were outside the protected class were retained. The positions

formerly held by Birkbeck and Richardson remain eliminated.

Marvel did not consider allowing Richardson or Birkbeck to displace lower ranking employees who may have been less senior or of a lesser rating in performance, because it was Marvel's policy not to allow employees to take lower ranking positions. Marvel felt that a demotion to a lower paying and less responsible position was poor practice and did not often work satisfactorily.

II.

The issues here are:

1. Whether there was sufficient evidence for a reasonable jury to conclude that persons outside the protected class were retained in the same position or that there was some other evidence indicating that the employer did not treat age neutrally in deciding to dismiss Birkbeck and Richardson.

2. Whether there was sufficient evidence for a reasonable jury to conclude that the legitimate, nondiscriminatory reasons articulated by Marvel and Fennessey for discharging the plaintiffs were pretextual.

3. Whether Fennessey in his individual capacity can be held liable for violation of the Age Discrimination in Employment Act.

The defendants move the court to enter judgment in their favor as a matter of law pursuant to the provisions of Rule 50 of the Federal Rules of Civil Procedure. That rule provides that, "if during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that

party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party." Fed. R. Civ. Pro. 50(a)(1). The Fourth Circuit has fleshed out the standard set out by Rule 50. Where causation is dispositive, as in an employment discrimination case which turns on the motive of the employer, the proper test of sufficiency of circumstantial evidence is whether the jury could reasonably conclude that there is a reasonable or substantial probability that the employer illegally discriminated against the employee. Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 241-242 (4th Cir. 1982). In other words, the necessary inference must be more probable than the conflicting inference. Id. at 242. See also Taylor v. Home Ins. Co., 777 F.2d 849, 854 (4th Cir. 1985); Smith v. Flax, 618 F.2d 1062 (4th Cir. 1980).

In deciding a motion for judgment as a matter of law, the court must view the evidence in the light most favorable to the opposing party and draw all inferences in that party's favor. The court cannot weigh the evidence or judge the credibility of the witnesses. Taylor v. Home Ins. Co., 777 F.2d 848, 854 (4th Cir. 1985). "Determination of motive is ordinarily a function within the province of the fact finder because so much depends on an assessment of the credibility of the witnesses. A finding of motive should not be set aside by the reviewing court unless the evidence clearly compels rejection." Id.

The substantive elements of a claim under the ADEA are (a) the employee is covered by the Act, that is, over 40 years of age, (b) the employee has suffered an unfavorable employment action by an employer covered by the Act, and (c) that the employee's age was a determining factor in the action in the sentence [sic] that "but for" the employer's motive to discriminate against him because of his age, he would not have suffered the action. Lovelace, 681 F.2d at 238, citing Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1112 (4th Cir.

1981).

The third element is usually the disputed question -- that is, whether the employee was treated unfavorably because of his age. This element may be proved by ordinary principles of proof, or it may be satisfied via a judicially created presumption. The Supreme Court set out that presumption in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and explained it further in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1980). According to those cases, a plaintiff can also prove discrimination by establishing a prima facie case, giving the defendant an opportunity to rebut it, and then showing that the defendant's rebuttal, if any, is pretextual. To establish a prima facie case, the plaintiff must show that (a) he was a member of the protected class, (b) he suffered an unfavorable employment action by the employer, (c) at the time of the action, he was performing at a satisfactory level, meeting his employer's legitimate expectations, and (d) that he was replaced by a person outside the protected class. E.E.O.C. v. Western Electric Co., Inc., 713 F.2d 1011, 1014; Lovelace, 681 F.2d at 239. In a reduction in force case, the last requirement can be fulfilled by a showing "that persons outside the protected class were retained in the same position or that there was some other evidence indicating that the employer did not treat age neutrally in deciding to dismiss the plaintiff." Herold v. Hajoca Corp., 864 F.2d 317, 320 (4th Cir. 1988) (emphasis added). See also Western Electric, 713 F.2d at 1014; EEOC v. Clay Printing Co., 955 F.2d 936, 941 (4th Cir. 1992).

III.

This motion turns on the plaintiffs' success in proving at trial that, but for their ages, they would not have been discharged. It is clear that both were covered by the Act at the time of discharge and that they both suffered unfavorable

employment action. It is also clear that the plaintiffs did not present sufficient direct or circumstantial evidence at trial to show discriminatory motive without resort to the McDonnell Douglas presumption. Thus, the plaintiffs had to establish a prima facie case and then show that any legitimate, nondiscriminatory reason offered by the defendants was not worthy of credence.

A.

1. Whether there was sufficient evidence for a reasonable jury to conclude that persons outside the protected class were retained in the same position or that there was some other evidence indicating that the employer did not treat age neutrally in deciding to dismiss Birkbeck and Richardson.

The plaintiffs successfully established the first three elements of the prima facie case.[2] The first issue, then, is whether the plaintiffs presented enough evidence at trial that a person outside the protected class was retained in the same position or that some other evidence indicating that Marvel did not treat age neutrally when it decided to discharge the plaintiffs. See Herold v. Hajoca Corp., 864 F.2d at 320.

First, with regard to Birkbeck, a younger man was not retained in the same position after he was discharged. His position as manager of the aluminizing department was eliminated. The entire department was shut down for several months. Some of his duties were assumed by Marvin Bethea, who was outside the protected class, but the evidence showed

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[2] Note that the defendants raised questions as to Birkbeck's performance at trial. They concede in their brief, however, that there was enough evidence presented for the jury to reasonably conclude that he was performing satisfactorily. See p. 21 of Defendants' brief.

that a plant manager retained control and authority over the department after operations were resumed. The evidence did not support the allegation that Bethea replaced Birkbeck as manager of the aluminizing department. Additionally, there was no evidence that any employees were transferred from the aluminizing department to any other department in the plant. Therefore, the fact that Birkbeck was not given another job in the plant is not evidence of discrimination. He was not treated any differently than any other employee, regardless of his or her age. See Fink v. Western Elec. Co., 708 F.2d 909, 916 (4th Cir. 1983) (entire program shut down; no age discrimination because all employees lost their jobs, all treated equally when employer helped them find new jobs).

Plaintiffs presented evidence at trial that Mr. Fennessey, two or three years before the reduction in force, indicated to Mr. Birkbeck in a discussion that "we all have to make room for younger people sometime." The remark was not directed at Birkbeck. It had nothing to do with the lay off in 1989. It was merely an expression of a fact applicable to all. It was similar to the language which the court dealt with in Smith v. Flax, 618 F.2d 1962, 1066 (4th Cir. 1980), that the "future lay in its young ... and that all employees at some time reach their peak in efficiency." To the same effect see EEOC v. Clay Printing Co., 955 F.2d 936 (4th Cir. 1992).

Second, the fact that Birkbeck was fired three years before his pension would have vested is not itself evidence of age discrimination. Pension benefits can be a proxy for age discrimination, particularly where those benefits are based on age rather than years of service. Hazen Paper Co. v. Biggins, No. 91-1600 (S. Ct. April 20, 1993). The fact that one employee was fired shortly before those rights vested is not sufficient by itself to justify the conclusion that the employee was fired to prevent his pension from vesting. The plaintiffs

did not present evidence at trial that Marvel fired Birkbeck specifically to interfere with his pension benefits, or that it fired any of its other employees to block their pension benefits. The plaintiffs did put on evidence that showed that many of the company's older employees left the company before their pension benefits vested. That evidence was vague and incomplete, however, and was not sufficient to support a jury's conclusion that the company fired Birkbeck or any other employee to interfere with their pension rights.

Third, it is a stretch to argue that Marvel shut down the aluminizing department, fired Birkbeck and all of the hourly employees, and then brought the department back up after several months just to get rid of Birkbeck. No reasonable jury could have reached that conclusion.

The remark made by Fennessey, the fact that Birkbeck's pension was to have vested at age sixty-five, and the fact that Marvel reactivated the aluminizing department several months after firing Birkbeck are not sufficient proof that age was not treated neutrally in making the decision to terminate Birkbeck.

Similarly, there is not sufficient evidence that Richardson was replaced by a younger man. Richardson's position as production supervisor of the "old side" was combined with the position of the production supervisor of the "new side" and Hayes, the production supervisor of the "new side" was retained as the supervisor of the combined position. Richardson was 55 and Hayes was 53, each being of the protected class. Such a difference is not significant. Though the courts have held that the fourth prong of the McDonnell-Douglas analysis can be satisfied even where the retained employee is within the protected class, Lovelace v. Sherwin-Williams Co., 681 F.2d at 237, 238, n.5, relative ages "have obvious relevance in assessing whether a factual inference of

age discrimination is permissible." Id. at 242, n.13.

Of the seventeen employees laid off on March 31, 1989, eight were outside the protected class. Additionally, of the thirty remaining management-level employees, twenty were within the protected class. The complete statistical picture, therefore, shows a balanced workforce, at least in terms of age, not a policy of discrimination based on age. The statistics do not evidence pattern-and-practice discrimination. See, e.g., EEOC v. Western Elec. Co., Inc., 713 F.2d 1011, 1015-16 (4th Cir. 1983) (reduction in force case; some younger supervisors retained, but all supervisors very close in age and many within protected class retained; not sufficient proof of age discrimination); Smith v. Flax, 618 F.2d 1062, 1066 (4th Cir. 1980) (evidence showed that employer hired persons within protected class; could not then conclude that there was youth movement occurring within company). Nor do the numbers support the conclusion that Marvel engaged in age discrimination directed specifically at Richardson.

Thus the plaintiffs failed to provide legally sufficient evidence at trial to make out their prima facie case. Even assuming that they did establish a prima facie case, however, another issue remains as to the sufficiency of the evidence.

B.

2. Whether there was sufficient evidence for a reasonable jury to conclude that the legitimate, nondiscriminatory reasons articulated by Marvel and Fennessey for discharging the plaintiffs were pretextual.

If the plaintiffs make out a prima facie case, defendants have the opportunity to rebut any presumption created by the prima facie case. The defendants can present evidence of a

legitimate, nondiscriminatory reason for the decision to terminate the plaintiffs. In this case, the defendants successfully rebutted any presumption by showing that a reduction in force took place when the plaintiffs were fired and that cost savings were realized as a result of the reduction. They asserted that the plaintiffs were victims of economic necessity, not illegal discrimination. The plaintiffs then were faced with the task of convincing the jury that the defendants' reason was pretextual. The plaintiffs relied primarily on the evidence they presented in their case in chief to show pretext.

With respect to Birkbeck, the plaintiffs emphasized Fennessey's comment and the fact the aluminizing department was only temporarily shut down.[3] They argued that these facts proved that the defendants' assertion that Birkbeck was terminated because his job was being eliminated was unworthy of belief. These facts are not sufficient to show discriminatory motive. The Fennessey comment was too remote in time and, taken in context, a mere truism, and it is just not reasonable to believe that the company shut down the aluminizing department just to get rid of Birkbeck.

As for Richardson, plaintiffs argued that the defendants' justification for terminating him was pretextual because the intended result had been achieved before Richardson was terminated. Specifically, plaintiffs assert Richardson's job as supervisor of the old side had already been combined with Hayes' job, and he was in fact a unit supervisor. Even if that was true, the plaintiffs did not present sufficient evidence to show that Richardson was laid off because of his age in relation to the other management-level employees. The statistics tell

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[3] The department did reopen, but without a separate department head. The assistant plant manager was the head of the department. It has again been eliminated.

another story. The plaintiff did not rebut those numbers at trial.

Thus, even if the plaintiffs established a prima facie case, they failed to show with evidence sufficient to convince a reasonable jury that the defendants' stated reasons for terminating the plaintiffs were pretextual.

IV.

The plaintiffs failed to establish a prima facie case as to both plaintiffs, and even assuming for the sake of argument that they did establish a prima facie case, it was successfully rebutted by the defendant and the plaintiffs failed to present evidence sufficient to support a jury finding that age discrimination was the more credible explanation for the action of the defendants.

In light of this conclusion, the court need not address the remaining issues in the case.

Defendants' motion for a judgment as a matter of law is **GRANTED**, the verdicts of the jury are set aside and judgment entered for defendants on each of the claims.

Copy of this order is forwarded to counsel.

s/ Richard B. Kellam
UNITED STATES DISTRICT JUDGE
Sitting by Designation

Norfolk, Virginia
June 15th, 1993

APPENDIX C: Statutory Appendix

United States Code, Title 29:

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer --

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

* * * * *

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization -

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable facts other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire an individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.

§626. Recordkeeping, investigation, and enforcement

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief

as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

§630. Definitions

For the purposes of this chapter --

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized group of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year; Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

Federal Rules of Civil Procedure, Rule 50(a):

(a) **Judgment as a Matter of Law.**

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for a judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

APPENDIX D: Charge to Jury on Liability
(Joint Appendix 570-578)

You have been chosen and sworn as Jurors in this case to try the issue of fact presented by the evidence. In deciding the facts of this case, you must not be swayed by bias or prejudice or sympathy for either of the parties. Our system of laws does not permit jurors to be governed by prejudice or sympathy or by public opinion.

Each of the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law which is given you in the charge of the court and arrive at a fair and impartial verdict.

The case should be considered and decided by you as an action between persons of equal standing in the community, holding the same or similar positions in life. A corporation is entitled to the same fair treatment at your hands as is a private individual. All persons, including corporations, stand equally before the law and are to be dealt with on an equal and fair basis.

This case involves the Plaintiffs' contention that the Defendants violated the Age Discrimination Employment Act -- that is sometimes called the A.D.E.A. -- when the Plaintiffs' employment was terminated on March 31, 1989.

The A.D.E.A. provides that an employer shall not discriminate against a person regarding employment, compensation or a term, condition or privilege of employment because of age. The A.D.E.A. only applies to persons age 40 and older. Your only task is to determine whether the Defendants discriminated against the Plaintiffs because of their age.

The Age Discrimination Employment Act prohibits employers to discriminate against people who are over 40 years of age. The Act covers all employment action, hiring, terminations, and layoffs. This case is an age discrimination case and the central issue to be decided is whether the Plaintiffs have proven by a preponderance of the evidence that they were terminated from their jobs because of their age. That is, whether their age was the determining factor in their being selected for layoff.

The burden is on the Plaintiff in a civil action such as this to prove each essential element of their claim by a preponderance of the evidence. If the Plaintiff should fail to establish an essential element of the Plaintiff's claim by a preponderance of the evidence, then the jury should find a verdict for the Defendant.

The burden of proof in an age discrimination case is on the Plaintiffs to prove that they were the victims of intentional age discrimination. In order to do so, Plaintiffs must prove by a preponderance of the evidence that age was not merely a factor, but they must prove that age was the determining factor in Marvel's decision to terminate their employment.

This burden of proof involves two key phrases, by a preponderance of the evidence, and determining factor.

To prove a case by the preponderance of the evidence means to prove that something is more likely so than not so. In other words, a preponderance of the evidence means evidence which when considered and compared with the evidence opposed to it has more convincing force and produces in your mind a belief that what is sought to be proven is more likely true than not.

In determining whether any fact in issue has been proven by a preponderance of the evidence in the case, the jury may consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

If the proof should fail to establish any essential element of the Plaintiffs' claim by a preponderance of the evidence, the jury should find for the Defendants.

There are two types of evidence from which the jury may properly make a finding. One is direct evidence, such as the testimony of an eyewitness relating what such person saw. The other is circumstantial evidence, the proof of a chain of circumstances pointing to what is sought to be established by them.

The law makes no distinction between direct evidence and circumstantial evidence. The Plaintiff is not required to prove the facts of his case by direct evidence. A Plaintiff may do so by circumstantial evidence. That simply means that you consider all of the facts and circumstances and proper inferences to be drawn from what is established in the evidence.

Among your duties will be to determine the credibility of the witnesses who have testified before you and what weight you will give to their testimony. In making such a determination, you may take into consideration the demeanor of the witness on the witness stand, the witness' apparent candor or frankness, bias of the witness if it is shown, the interest of the witness in the outcome of the proceedings or the lack of any interest in the outcome of the proceedings, opportunity for having observed the correctness or truthfulness of the facts related by the witness, any prior inconsistent

statements, if established by the evidence, and from these and all other facts and circumstances in evidence, you determine the credibility of the witnesses and the weight which you see fit to give to their testimony.

Discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause you to discredit their testimony, but in weighing a discrepancy, consider first whether it deals with a matter of importance or whether it is some unimportant detail, and secondly, whether it results from innocent error or whether it is the result of a willful falsehood.

The company called Plaintiffs' termination a layoff and laid off a number of other workers at the same time. The Plaintiffs are not challenging the company's decision to lay off workers temporarily, but even when a layoff of part of the work force is done for a legitimate reason, the layoff cannot be carried out in a way that discriminates against workers because of their age.

If you find from the evidence that the reasons given by the Defendants for the layoff of Plaintiffs were not true, that fact may be considered by you along with all of the other evidence in arriving at your verdict in this case.

In order to find age discrimination, you do not need to have direct evidence, such as an employer saying he is laying off someone because of their age. In making a determination of whether Defendants discriminated against the Plaintiffs or either of them, because of their age, you may consider the circumstances of the layoff and any and all other facts and circumstances in the evidence.

Although a financial downturn may require a layoff of some workers, it is not permissible to select an older employee for termination merely to save money, and it is not permissible to re-shuffle duties to justify terminating an older, more expensive employee.

Each Plaintiff has the burden of proof by a preponderance of the evidence, that age was a determining factor in the termination of his employment by the Defendants. The burden does not require an employee to prove that age was the sole reason for the Defendants' action, but that but for the Plaintiff's age, his employment would not have been terminated.

The term determining factor means that the Plaintiffs must prove that their discharge would not have occurred but for their age. Plaintiffs must prove not only that their age was one of the reasons for Defendants' action, but that their age made an actual difference in determining whether they were terminated, in the sense that they would not have been terminated but for the fact of their age.

On the other hand, if you find that the Defendants terminated the Plaintiffs for a reason or reasons other than the age of the Plaintiffs, so that their age was not a determining factor in the Defendants' decision, then your verdict should be for the Defendants.

In order for Plaintiffs to prevail, they must prove by a preponderance of the evidence that but for the Defendants' motive to discriminate against the Plaintiffs on the basis of age, the Plaintiffs would not have been discharged.

Plaintiffs may meet their burden of proof through the use of direct evidence or indirect or circumstantial evidence.

Defendants have offered evidence that the Plaintiffs' jobs were eliminated as a part of a cost reduction effort. Defendants are not required to prove the absence of discrimination. If Defendants offer a legitimate non-discriminatory reason for their actions, the Plaintiffs, in order to prevail, must prove by a preponderance of the evidence that Defendants [sic] stated reasons were a pretext or a coverup for their discrimination.

In the final analysis, Plaintiffs must prove by a preponderance of the evidence that in Defendants' decision to terminate the Plaintiffs, age was a prevailing factor, that is, but for their age, they would not have been terminated.

In determining whether Defendants discriminated against Plaintiffs because of their age, you are not to substitute your judgment for Defendants' business judgment or to decide this case based on what you would have done, even if you disapprove of the decisions of the Defendants to terminate the employment of the Plaintiffs. This is not a legal reason to render a verdict for the Plaintiffs.

An employer can terminate an employee for a good reason or a bad reason or no reason at all, without violating the A.D.E.A., as long as the employment decision is not made because of the age of the employee.

The Defendants have stated that a reason for not offering Plaintiffs continued employment while different responsibilities -- I'm sorry. The Defendants have stated that a reason for not offering Plaintiffs continued employment with different responsibilities and/or lower pay was that Defendants believed demoting and keeping the employee was not a good idea. In deciding whether this was a real reason or a pretext, you may consider whether a non-demotion rule was followed in all cases or whether there were instances of employees being

kept at a demotional level.

The law does not require that older employees be given any special or preferential treatment because of their age or seniority. Specifically, an employee's length of service or his seniority does not mean he can be discharged for legitimate reasons. The law requires only that persons of the age of 40 or over be treated in a mutual fashion, that is, persons 40 or over have no greater or lesser rights than anyone else.

As long as employers do not act with discriminatory intent, they may eliminate positions because of economic necessity or efficiency, even when those positions are held by more senior employees.

The A.D.E.A. does not require an employer to offer employees whose jobs are eliminated for economic reasons other positions even if employees holding other positions may be less experienced, less qualified or poorer employees, unless it can be shown that younger, similarly situated employees have been offered such opportunities.

The fact that Plaintiffs were capable of handling jobs other than their own yet were not relocated or transferred to such jobs is not enough to show a violation of the A.D.E.A.

The A.D.E.A. does not place on employers an affirmative obligation to retain older employees, if and when a reduction in staff becomes necessary. Even if you believe that the Defendants unreasonably or incorrectly selected the Plaintiffs for termination, that would not entitle Plaintiffs to recover in this case, unless you find from the evidence that age was a determining factor in their discharge.

APPENDIX E: Expert Statistical Testimony

[JA 394]
By Mr. McClain:

Q. Dr. Norton, do you have any particular training in the area of probability and statistics?

A. Well, My PH.D. is in probability. I did a lot of work with probability distributions and their applications, non-parametric statistics, inferential statistics.

Q. You say your PH.D. is in, does that mean you did your dissertation work in that area?

A. Probability theory, specifically, yes Sir.

[JA 396]

Mr. McClain: Your Honor, we would tender Dr. Norton as an expert qualified to offer expert opinion testimony in probability and statistics relating here to the terminations of these positions.

The Court: All right. You may proceed.

Mr. Brooks: No objection to his qualifications as an expert under the Rules, Your Honor.

By Mr. McClain:

Q. Dr. Norton, let me show you a document that's been introduced into evidence as Plaintiff's Exhibit 20, which you may have occasion to refer to in your testimony?

A. Okay.

Q. Now, are you familiar with Exhibit 20?

A. Yes, sir.

Q. That Exhibit includes the names and positions held and dates of hire and dates of birth of certain management and supervisory employees at Marvel Lighting Corporation?

A. Yes, it does.

Q. Let me ask you to assume for the purpose of this question that the positions occupied by Alan Birkbeck and J.C. Richardson were eliminated on March 31, 1989, and those were the only two positions eliminated by the employer on that date, among the positions that are shown on Exhibit 20?

[JA 397]
By Mr. McClain:

Q. Have you calculated the probability, Dr. Norton, without drawing any inferences as to the relation between that probability and any other fact, but have you calculated the probability that the positions held by Mr. Birkbeck and Mr. Richardson would have been the only two positions eliminated without regard to age of the persons in the position?

A. I have, yes, Sir.

Q. And can you tell the jury what that probability would be?

A. It's .01 or one chance in a hundred, roughly.

* * *

[JA 398]
By Mr. McClain:

Q. Dr. Norton, how would you characterize the result of a probability of one in a hundred as compared with other probability results that are evaluated in your professional [JA 399] experience?

A. A word that is often associated is it's a significant outcome.

Q. It's a significant outcome?

A. Yes.

Q. At what level of percentage would the outcome not be considered significant?

A. One standard rule is that it's something that occurs five percent of the time or less, would be considered significant.

* * * * *

Q. Now. The pool that was selected for this analysis. Can you tell us on Exhibit 20 there, can you tell us which persons were included in your analysis?

A. The first 20. That is everybody except Collins and [JA 400] Palmer.

Q. And if Collins and Palmer had been included in the analysis, would the outcome have been a smaller probability or greater probability?

Mr. Brooks: Objection, Your Honor. His earlier testimony was talking about jobs, not particular individuals.

Mr. McClain: I'm sorry, the jobs of Collins and Palmer.

Mr. Brooks: Withdrawn.

The Witness: The probability would be smaller than what I stated before.

By Mr. McClain:

Q. Less than one in a hundred?

A. Yes.

Q. If you were to eliminate the positions in the machine shop, which were held by Mr. Gilchrist and Mr. Russell, what would the probability of a similar analysis be?

A. This would also be smaller than the .01, because of Mr. Russell's age.

Q. Have you done that computation?

A. I have, yes, Sir.

Mr. Brooks: Objection. Withdrawn.

By Mr. McClain:

Q. What would that computation be?

A. If memory serves, it's about .0065. I think that's [JA 401] right.

Q. That would be six and a half times in a thousand?

A. That would be correct.

Q. Is the group of 20 that you have analyzed here too small for a meaningful result?

A. No, it's not.

Q. Can you explain why, how these 20 positions can be meaningfully analyzed?

A. Well, you have to have enough possibilities to be able to get a significant result. For example, if you tossed a coin one or two times, the probability of getting heads only even at its smallest would not be less than the five percent standard, but five or six times with a coin is enough, and with 20 people, 20 positions, 20 positions and two positions terminated, that is enough.

Q. Just as a comparison, did you do an analysis of the probability of persons on that, or positions on that list being eliminated on the basis of the day of the month that the individuals were born?

A. I did.

Mr. Brooks: I'm sorry, Your Honor, the day of the months?

By Mr. McClain:

Q. Yes.

A. I did such an analysis. Yes.

[JA 402]
Q. What was the result there?

A. The probability there I think was .29, larger than the five percent standard.

[JA 403]
Mr. McClain: With the exception of the matter I had indicated earlier we would proffer, we would close Dr. Norton's testimony at this time on direct.

CROSS EXAMINATION

By Mr. Brooks:

Q. Dr. Norton, you testified you conducted two tests or analyses and you identified one as the Willcoxin at the beginning of your testimony?

A. Yes, Sir.

Q. And the other was the Fisher Test?

A. The Fisher Exact Test, yes, Sir.

[JA 404]
Q. You did different analyses with different data in this case, did you not?

A. Two different ways of looking at the data. Yes, Sir.

Q. And if you look just at the terminations of the groups you were dealing with, people who went out the door on March 31, 1989, under the Fisher Exact Test, that was statistically insignificant?

A. That's the four people.

Q. Yes?

A. Yes, that was not significant.

Q. If you use four people again under the Willcoxin Test, it's not statistically significant?

A. I would want to look at that, because let's see, I think the answer to that is no. I think you're right.

Q. It's not statistically significant?

A. I think so.

Q. So, if we're looking at the terminations, the four people we know went out the door of these people on March 31, 1989, it is not statistically significant, is it, Sir?

A. For the four, no, Sir.

Mr. Brooks: Thank you.

The Court: May he be excused?

Mr. McClain: Yes, Sir.

The Court: Thank you, Doctor. You may be excused to go.

[JA 442]

Mr. McClain: First, Your Honor, with respect to the testimony of Dr. Norton, you'll recall that we indicated that we would be happy to proffer the testimony that you had indicated

would invade the province of the jury or would otherwise be excludable, and you indicated it would be okay for me to state it for the record, for Dr. Norton to leave and Mr. Linskey could testify and meet his travel obligations. So if I might do that briefly.

The Court: Yes, Sir, fine.

Mr. McClain: With respect to the significance of the statistical evidence, Your Honor, Professor Norton would have testified that the finding of one chance in a hundred of the analysis of the first 20 people on Exhibit 20 would be considered evidence that age was a factor in the selection of [JA 443] the two positions of the Plaintiffs to be terminated. That it would not have constituted, in his judgment, absolute mathematical proof, because no statistical test meets that case. Mathematical proof in that sense being like a logical theorem in geometry or a sum in arithmetic where something has to be by the nature of the relations between the numerical or geometric facts. But that probability cannot provide that kind of evidence or proof. But that it does provide evidence from which an inference may reasonably be drawn and which in the exercise -- and which he would draw to a reasonable degree of certainty in the field of probability and statistics, that based on the tests he did, age was a factor in the selection of those two positions. I believe that is the substance of the testimony that we were not able to offer before the jury.

* * *

Supreme Court, U.S.
FILED
NOV 21 1994
OFFICE OF THE CLERK

No. 94-719

In The

Supreme Court of the United States

October Term, 1994

PATRICIA BIRKBECK, as Personal Representative of the Estate of Alan Birkbeck, Deceased; J. C. RICHARDSON,

Petitioners,

v.

MARVEL LIGHTING CORPORATION; BRUCE T. FENNESSEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

LOVIC A. BROOKS, III
(Counsel of Record)
KRISTINE L. THOMPSON

CONSTANGY, BROOKS & SMITH
Suite 810, NationsBank Tower
1301 Gervais Street
Columbia, SC 29201-3326
(803) 256-3200

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether the Court of Appeals' affirmance of the District Court's grant of judgment as a matter of law pursuant to Rule 50, FRCP, based upon a finding of insufficient evidence to support a verdict conflicts with this Court's decisions or otherwise was in error?

II. Whether individual agents of an employer can be individually liable for monetary damages under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, for employment decisions made within the scope of their employment?

PARTIES

All parties are correctly identified in the Petition. Respondent Marvel Lighting Corporation is a wholly owned subsidiary of Marcliff Corporation. Neither corporation has related, affiliated, or subsidiary corporations other than wholly owned subsidiaries.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Marvel Lighting Corporation and Bruce Fennessey, respectfully request that the Court deny the Petition for a Writ of Certiorari of Petitioners, Patricia Birkbeck[1] and J. C. Richardson.

[1] Patricia Birkbeck was substituted as a party for Alan Birkbeck who died during the pendency of this action. References hereafter to "Birkbeck" are to Alan Birkbeck.

STATEMENT OF THE CASE

Birkbeck and Richardson claim that Marvel and Fennessey terminated their employment with Marvel in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, ("ADEA"). They were employed by Marvel until March 1989, at which time their jobs were eliminated as a part of an economic reduction-in-force involving fifteen of Marvel's approximate two hundred employees. The economic reduction was caused by a "price war" being waged by three major corporations in the light bulb industry in which Marvel was attempting to compete. Fennessey, Marvel's vice president of manufacturing, made the final decision to eliminate the management positions of Birkbeck and Richardson.

Fennessey decided as a cost reduction measure to combine the production supervisor positions of Richardson, age 55,[2] and Doug Hayes, age 53. Fennessey tentatively decided to terminate Hayes and award Richardson the combined position, but he ultimately reversed this decision upon being advised by manufacturing manager, Harold Linskey, age 56, and plant manager, Dan Schiavo, age 65, that Hayes possessed mechanical and technical skills essential to the operations which Richardson did not possess. Also, Hayes had successfully performed both jobs during Richardson's extended leave of absence in 1987 and 1988. Richardson's termination by Fennessey forms the basis for his age discrimination claim.

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[2] All ages reflect ages of individuals as of March 31, 1989.

Birkbeck was responsible for a manufacturing department which was experiencing problems to the point that Marvel could purchase the component being manufactured in this department from an outside supplier at a lesser cost. Fennessey decided to shut down operations in this department and eliminate the jobs of the employees, including Birkbeck. The one exception was that the department's group leader, Marvin Bethea, age 36, was retained for the purpose of conducting tests for plant manager Schiavo, who was assigned the responsibility by Fennessey to attempt to work out the problems in the department so that operations could be resumed at a later date. Fennessey wanted to resume operations because Marvel's outside source for the product was a major competitor. In fact, operations were resumed several months later, but were discontinued again a short time later due to the continued inability to produce the product in a cost efficient manner. Birkbeck's termination formed the basis for his age discrimination claim.

A trial on the merits was held in April 1993. The jury returned a verdict in favor of Petitioners on their claims of intentional age discrimination and a verdict in favor of Respondents on the claims of a willful violation of the statute.

Following the verdicts, the District Court for the District of South Carolina granted Respondents' motion for judgment as a matter of law pursuant to Rule 50, FRCP. The District Court also ruled that Fennessey could not be held individually liable for monetary damages under the ADEA. The United States Court of Appeals for

the Fourth Circuit affirmed.[3] Petitioners' Petition for a Writ of Certiorari followed.

SUMMARY OF ARGUMENT

The Fourth Circuit's decision does not conflict with any decision of this Court or with any decision of any other Court of Appeals, as urged in the Petition as the basis for this Court invoking its discretionary review power. Rather, the Fourth Circuit carefully analyzed the evidence in the record in this case and concluded on the basis of existing, valid interpretations of the ADEA that the evidence was insufficient to support Petitioners' ADEA claims and, instead, required judgment as a matter of law for Respondents.

The lower courts' further conclusion that an individual cannot be personally liable for monetary damages under the ADEA is a correct construction of the statute which does not conflict with any decision of this Court or with any decision of any other Court of Appeals. This issue is not an important question of federal law which needs to be settled by this Court. Further, in the absence of a grant of the Petition, reversal of the lower court and reinstatement of the verdict, the issue is moot in this case.

[3] The Opinions of the Fourth Circuit and District Court are reproduced in the Appendix to the Petition at pages App. 1-13 and pages App. 14-26, respectively. The Fourth Circuit's Opinion is also published at 30 F.3d 507.

ARGUMENT

I. Reasons for Denial of the Petition

This case presents no issue warranting invocation of this Court's discretionary review powers. The Fourth Circuit's decision is based on its conclusion that the evidence presented by Birkbeck and Richardson in support of their ADEA claims was insufficient as a matter of law to support a jury's finding of intentional age discrimination. The Fourth Circuit's decision in this regard does not conflict with any decision of this Court or with any decision of any other Court of Appeals in its application of the legal standards applicable to its review.

Notably, the Petition is silent as to Rule 50, FRCP, and silent as to the legal standard for granting judgment as a matter of law in ADEA cases. Instead, the Petition contends that the decision conflicts with this Court's decisions in *St. Mary's Honor Center v. Hicks*, 509 U.S. ___, 113 S.Ct. 2742 (1993) and *Anderson v. Bessemer City*, 470 U.S. 564 (1985), as well as with other Courts of Appeals' interpretation of these decisions.

In *Hicks*, this Court addressed the scheme of proof under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and resolved a conflict among the circuits on the proper application of the scheme of proof developed by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny. This Court held in *Hicks* that rejection of a defendant's claimed nondiscriminatory reason does not compel a finding of discrimination by the factfinder. 113 S.Ct. at 2749. The Court acknowledged further that such a finding of

pretext, coupled with the elements of a *prima facie* case, *may* support a finding of discrimination provided there is an actual finding of intentional discrimination. *Id.* at 2749. *Hicks* did not involve and did not address the role of a court in reviewing a jury verdict pursuant to Rule 50, FRCP, to determine whether there was sufficient evidence to support it, which was the issue before the Fourth Circuit in this case. Nonetheless, Petitioners somehow equate the grant of judgment as a matter of law in this case to be a ruling by the Fourth Circuit in conflict with the *Hicks* decision. Their logic is that since the jury was properly instructed as to the law, the jury must have found both pretext and other evidence of discrimination. The Fourth Circuit's reversal, according to this logic, then constituted the establishment of a "pretext plus" requirement in conflict with *Hicks*.[4] If one agrees with Petitioners' logic, then Rule 50 would become meaningless in cases of this kind, and jury verdicts in discrimination cases would be beyond court review. *Hicks* suggests no such result. To the contrary, this Court in *Hicks* acknowledged the need for court review of findings of fact:

> That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that plaintiff's proffered reason for race is correct. That remains

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[4] The dissent in *Hicks* characterized the majority's holding as establishing a "pretext plus" standard. *Id.* at 2762. Presumably, Petitioners contend the Fourth Circuit established a different "pretext plus" standard and one which conflicts with *Hicks*.

> a question for the factfinder to address, subject, of course, to appellate review. . . . *Id.* at 2756.

The asserted conflict between the Fourth Circuit decision and the *Hicks* decision simply does not exist.

Petitioners also contend that the Fourth Circuit's ruling conflicts with this Court's decision in *Anderson v. Bessemer City, supra,* 470 U.S. 564 (1985). Specifically, they point to the statement in *Anderson* that a reviewing court may not "reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Id.* at 573. The Petition explains the asserted conflict as follows:

> But this is precisely what happened here, when the jury, who heard Fennessey testify, was convinced that he had lied, but the Court of Appeals held that 'plaintiffs have not introduced any evidence to convince us otherwise.' Petition at pages 11-12.

The Fourth Circuit's actual holding was that Petitioners' evidence was insufficient as a matter of law to establish discrimination. The language Petitioners characterize as the Fourth Circuit's holding was made in this context:

> Fennessey hired a 54 year old worker at approximately the same time he made his allegedly discriminatory statement, and hired a 60 year old worker several years before that. Such hiring practice is significant. As we have stated, 'employers who knowingly hire workers within a protected group seldom will be credible targets for charges of pretextual firing.' Plaintiffs have not introduced any evidence to convince us otherwise. (Citations omitted) 30 F.3d at 513.

Based on this one comment in assessing whether the evidence was sufficient as a matter of law to support a finding of discrimination, Petitioners assert that there is a conflict with *Anderson*. The Fourth Circuit did not rule how it would have interpreted the evidence as a factfinder, but instead concluded that the evidence presented was insufficient as a matter of law for a reasonable jury to find age discrimination. This is the appellate court's function and obligation under Rule 50, FRCP. As quoted above, *Hicks* acknowledged this role, albeit in the context of reviewing findings of fact from a bench trial, and cited *Anderson*. 113 S.Ct. at 2756.

The Petition further seeks a review of whether agents of employers may be personally liable for monetary damages in ADEA cases. There is no conflict among the Courts of Appeals on this issue. The Fourth Circuit in this case and the Ninth Circuit in *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583 (9th Cir. 1993) are the only Courts of Appeals which squarely address this issue, and both have concluded that an individual cannot be personally liable for monetary damages. The Fifth Circuit and Ninth Circuit have interpreted Title VII's similar language the same way. *Harvey v. Blake*, 913 F.2d 226, 227-228 (5th Cir. 1990); *Padaway v. Palches*, 665 F.2d 965, 968 (9th Cir. 1982). There is no conflict among the circuits, and the issue is not one which rises to the level of an important question of federal law which should be settled by this Court. Moreover, in the context of this case, the issue is moot in

the absence of granting the Petition on the other issues raised, reversal, and a reinstatement of the verdict.[5]

II. Judgment as a Matter of Law for Respondents was Proper Because Petitioners Presented Insufficient Evidence to Support Their Age Discrimination Claims

Petitioners frame the issue in this case as being one of a decision which conflicts with the rulings of this Court and other courts on the scheme of proof and the role of the jury in an ADEA case. The real dispute and the disagreement of Petitioners is with the lower courts' finding that their evidence was insufficient as a matter of law to support a finding of discrimination, notwithstanding the verdict of the jury.

The Petition identifies four aspects of the Fourth Circuit's decision which Petitioners contend conflict with the decisions of this Court or with decisions of other Courts of Appeals: (a) balanced work force / hiring older workers (Petition, p. 15); (b) selections for reductions-in-force (Petition, pp. 15-16); (c) statistics (Petition, pp. 16-17); and (d) Fennessey's remark (Petition, pp. 17-18). Each will be briefly addressed.

The Fourth Circuit acknowledged the existence of an age-balanced work force at Marvel and the hiring by Fennessey of individuals well into the protected class. 30

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[5] A determination of the latter would have to be made on remand since the lower courts have not addressed Respondents' motion for a new trial in the alternative to judgment as a matter of law. 30 F.3d at 513, n.3.

F.3d at 513. Petitioners cite an Eighth Circuit decision which apparently takes a different view than the Fourth Circuit. *Brown v. Stites Concrete, Inc.*, 994 F.2d 553, 567 n.8 (8th Cir. 1993). Clearly, this dictum in a footnote from one case and in a discussion of an evidentiary point in another does not create a conflict between the circuits on a point of law warranting review by this Court.

Next, Petitioners urge that neither economic difficulties nor a balanced work force immunize an employer from a finding of discrimination. Two cases are cited to support this proposition.[6] The Fourth Circuit never stated otherwise in its decision, and the Petition points to no aspect of the decision which Petitioners claim does so.

The Fourth Circuit rejected Petitioners' statistical evidence for several reasons. One reason was the small size of the statistical pool.[7] 30 F.3d at 511. Petitioners cite First and Fifth Circuit decisions which accepted statistical evidence based on similar size pools. Assuming, *arguendo*, there exists a conflict among the circuits on this point (a proposition with which Respondents disagree due to the highly factual and case-specific nature of evidentiary rulings on statistical evidence), this was just one of the reasons the Fourth Circuit rejected the statistical evidence. The most important reason was that the expert's opinion was based on the presumption that the

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[6] *Hebert v. Mohawk Rubber Co.*, 872 F.2d 1104 (1st Cir. 1989); *Ayala v. Mayfair Molded Products, Inc.*, 831 F.2d 1314 (7th Cir. 1987).

[7] *Freeman v. Package Machinery Co.*, 865 F.2d 1331, 1338 (1st Cir. 1988); *Bunch v. Bullard*, 795 F.2d 384 (5th Cir. 1986).

two Petitioners were the only two individuals terminated, when in fact they were among fifteen terminated, with over half under the age of 40. Even when considering only the four supervisory employees involved in the reduction, the expert testified that there was no significant connection between age and the four individuals laid off. 30 F.3d at 511.

Finally, Petitioners take exception with the Fourth Circuit's rejection of an alleged age-related remark as evidence of age bias. The statement ("there comes a time when we have to make way for younger people") is characterized by Petitioners as being made by Fennessey in response to Birkbeck expressing concern about his future with Marvel. (Petition, p. 17) More accurately, according to Birkbeck's testimony, this was a statement by Fennessey, himself well into the protected class, in *response* to Birkbeck expressing concerns about his arthritic condition and saying to Fennessey that he "was very, very expertise and could give a lot of expert advice and training to younger people." (J.A. 367) This alleged statement was made almost three years prior to Birkbeck's termination. While the Petition cites several Courts of Appeals' decisions accepting age-related statements as evidence of discrimination under the particular facts of those cases, the Courts of Appeals have unanimously ruled that stray remarks made at a remote time do not constitute evidence of discrimination. *Guthrie v. Tifco Industries*, 941 F.2d 374 (5th Cir. 1991); *Phelps v. Yale Security, Inc.*, 986 F.2d 1020 (6th Cir. 1993); *Frieze v. Boatman's Bank*, 950 F.2d 538 (8th Cir. 1991); *Merrick v. Farmers Insurance*, 892 F.2d 1434 (9th Cir. 1990). There is no conflict among the circuits on this issue.

III. Monetary Liability for Agents of Employers is not Permitted under the Age Discrimination in Employment Act

Respondents have previously addressed why the Fourth Circuit's ruling that Fennessey could not be individually liable for monetary damages does not warrant review by the Court, *supra* at 8-9. Moreover, the Fourth Circuit's ruling is based on the clear language of 29 U.S.C. § 630(b), which limits the Act's coverage to employers who employ more than twenty persons. The lower court correctly ruled that there can be no basis for finding individual liability against an individual who employs no one.

CONCLUSION

The rulings of the lower courts that Respondents are entitled to judgment as a matter of law based on Petitioners' failure to present sufficient evidence to establish a violation of the ADEA were correct. The Fourth Circuit's ruling does not conflict with any decision of this Court or with any decision of any other Court of Appeals. There is no important question of federal law which has not been, but should be, settled by this Court or any other reason to call for an exercise of this Court's power of supervision. Consequently, Respondents

respectfully request that the Court deny the Petition for a Writ of Certiorari filed by Petitioners.

Respectfully submitted,

LOVIC A. BROOKS, III
(Counsel of Record)
KRISTINE L. THOMPSON

CONSTANGY, BROOKS & SMITH
Suite 810, NationsBank Tower
1301 Gervais Street
Columbia, SC 29201-3326
(803) 256-3200

Attorneys for Respondents

Dated: November 21, 1994.

Supreme Court, U S
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PETITIONERS' REPLY MEMORANDUM

Herbert W. Louthian
P. O. Box 1299
Columbia, SC 29202
(803) 256-4274

Ray P. McClain
Counsel of Record
P. O. Box 608
Charleston, SC 29402
(803) 577-3170

No. 94-719

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Respondents assert that the decision below does not conflict with Hicks because Hicks allows appellate review of jury verdicts. The holding by the Court of Appeals in this case clearly conflicts with the decision in St. Mary's Honor Center v. Hicks, 509 U.S. ___, 113 S.Ct. 2742 (1993), in that the court found the evidence insufficient as a matter of law to prove age discrimination even though the jury had found discrimination, by resolving several conflicts of credibility.

As Respondents tacitly concede, the jury was properly instructed on the scheme of proof applied by this Court in Hicks, which amplified the decision in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The jury's determination of the facts is entitled to great weight.[1] If the District Courts and the Courts of Appeals are not required to follow the implications of the scheme of proof from the cases decided from McDonnell Douglas through Hicks, the courts would have no standards for reviewing the sufficiency of the evidence when a jury returns a verdict based primarily or wholly on circumstantial evidence.

When the decision of a properly instructed jury is given the deference that is required in deciding a Rule 50 motion, after the jury finds both pretext and discrimination vel non, the burden is no longer on the employee to "convince us" (the court) of pretext -- the burden falls to the employer to show that "the evidence clearly compels rejection" of the jury's finding. App. 19.

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[1] The District Court below recognized this, App. 19:

> In deciding a motion for judgment as a matter of law, the court must view the evidence in the light most favorable to the opposing party and draw all inferences in that party's favor. The court cannot weigh the evidence or judge the credibility of the witnesses. Taylor v. Home Ins. Co., 777 F.2d 848, 854 (4th Cir. 1985). "Determination of motive is ordinarily a function within the province of the fact finder because so much depends on an assessment of the credibility of the witnesses. A finding of motive should not be set aside by the reviewing court unless the evidence clearly compels rejection." Id.

The Court of Appeals did not acknowledge this standard.

In the decision below, as in Anderson v. Bessemer City, 470 U.S. 564 (1985), this same Court of Appeals has adopted an approach where it actually substitutes its judgment of the weight and credibility of the evidence for the decision made by the finder of fact. This is not proper "appellate review" referred to in Hicks, 113 S.Ct. at 2756.

CONCLUSION

Respondents do not deny that there is a conflict in the circuits about whether Hicks requires "pretext plus"; they contend Hicks required "pretext plus" (Brief in Opposition, p. 6 n. 4), whereas the majority of Courts of Appeals have held to the contrary. (Petition for Certiorari, p. 9, n. 8.) Respondents contend that Hicks allows a court to set aside a jury verdict of employment discrimination whenever that court considers this evidence "insufficient as a matter of law" -- without regard to the standards for circumstantial evidence of discrimination established in Hicks, McDonnell Douglas, and related cases.

Petitioners do not contend that a jury verdict based on a finding of pretext could never be set aside, but such action would be rare. No verdict should be set aside where, as here, the employees presented a prima facie case and the jury then found that the employer, who testified, was lying about the reason that the employees were fired.

The Court should grant the writ of certiorari.

HERBERT W. LOUTHIAN, SR.
Post Office Box 1299
Columbia, SC 29202

RAY P. McCLAIN
Counsel of Record
Post Office Box 608
Charleston, SC 29402